Salem Hospital Corporation a/k/a the Memorial Hospital of Salem County *and* Health Professionals and Allied Employees (HPAE). Case 4–CA–64455

November 29, 2011

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS BECKER AND HAYES

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on September 14, 2011, the Acting General Counsel issued the complaint on September 19, 2011, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 4–RC–21697. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer, admitting in part and denying in part the allegations in the complaint and asserting affirmative defenses.[1]

On October 12, 2011, the Acting General Counsel filed a Motion for Summary Judgment. On October 13, 2011, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response and cross-motion to dismiss the complaint.

[1] The Respondent's answer denies knowledge or information sufficient to form a belief concerning the filing and service of the charge. Copies of the charge and affidavit of service of the charge are included in the documents supporting the Acting General Counsel's motion, showing the dates as alleged, and the Respondent has not challenged the authenticity of these documents.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain,[2] but contests the validity of the certification based on its contention in the underlying representation proceeding that the bargaining unit improperly includes statutory supervisors. The Respondent further contends that it has not been afforded the opportunity to litigate its defense that the election was affected by supervisory taint.[3]

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding.[4] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).[5]

[2] The Respondent's answer denies the allegations in complaint pars. 8 and 9. These paragraphs state, respectively, the legal conclusions that the Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative of its employees in violation of Sec. 8(a)(5) and (1) of the Act, and that the unfair labor practices of the Respondent affect commerce within the meaning of Sec. 2(6) and (7) of the Act. Accordingly, the Respondent's denials with respect to these allegations do not raise any material issues of fact to be litigated in this proceeding. In addition, we find no merit in the Respondent's affirmative defenses that the Union's certification is invalid due to the Acting General Counsel's failure to transfer the underlying representation proceeding and other charges to a different Regional Office and his dismissal of an unfair labor practice charge filed by the Respondent.

[3] The Respondent also argues that the Board must deny the instant Motion for Summary Judgment and grant its cross-motion to dismiss because the Board has not ruled on the Respondent's (then-pending) request for review of the Regional Director's Supplemental Decision on Objections to Election. On November 21, 2011, the Board issued an erratum to the Decision and Certification of Representative in Case 4–RC–21697, denying the request for review. Thus, the issues raised by the Respondent's argument in this regard are moot. Moreover, "it is well established that an employer is not relieved of its obligation to bargain with a certified representative pending Board consideration, or reconsideration, of a request for review." *Benchmark Industries,* 262 NLRB 247, 248 (1982), enfd. mem. 724 F.2d 974 (5th Cir. 1984); see also *Allstate Insurance Co.*, 234 NLRB 193 (1978).

[4] Chairman Pearce did not participate in the underlying representation proceeding. He agrees, however, that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding, and that summary judgment is therefore appropriate.

[5] In its response to the Notice to Show Cause, the Respondent acknowledges that generally, in the absence of newly discovered or previously unavailable evidence or special circumstances, a respondent is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding. This principle is longstanding and endorsed by the Supreme Court. See *Pittsburgh Plate Glass Co.,* supra at 162. The Respondent argues, however, that such relitigation is warranted here because it was foreclosed from establishing in the prior

Accordingly, we grant the Motion for Summary Judgment.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation, has operated an acute care hospital at 310 Woodstown Road, Salem, New Jersey (the Hospital).

During the 12-month period preceding the issuance of the complaint, the Respondent received gross revenues in excess of $250,000 and purchased and received at the Hospital goods valued in excess of $50,000 directly from points outside the State of New Jersey.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and has been a health care institution within the meaning of Section 2(14) of the Act, and that the Union, Health Professionals and Allied Employees (HPAE), is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the representation election held September 1 and 2, 2010, the Union was certified on August 3, 2011, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time, and per-diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, excluding all other employees, managers, guards and supervisors as defined in the Act.

The Union continues to be the exclusive collective-bargaining representative of the unit employees under Section 9(a) of the Act.

B. Refusal to Bargain

At all material times, Richard Grogan held the position of chief executive officer of the Respondent and has been a supervisor of the Respondent within the meaning of Section 2(11) of the Act and an agent of the Respondent within the meaning of Section 2(13) of the Act.

By letter dated August 8, 2011, the Union requested the Respondent to recognize it as the exclusive collective-bargaining representative of the unit employees and bargain with it concerning the wages, hours, and other terms and conditions of employment of the unit. On about August 17, 2011, the Respondent, by letter of Richard Grogan, notified the Union that it refused to recognize and bargain with the Union as the exclusive collective-bargaining representative of the unit. We find that this failure and refusal constitutes an unlawful failure and refusal to recognize and bargain with the Union in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing since August 17, 2011, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co*., 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co*., 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Salem Hospital Corporation a/k/a the Memorial Hospital of Salem County, Salem, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain with Health Professionals and Allied Employees (HPAE), as the exclusive collective-bargaining representative of the employees in the bargaining unit.

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representation proceeding that the Union's status of majority representative did not result from a free and fair election, citing *Sub-Zero Freezer Co.*, 271 NLRB 47, 47 (1984). *Sub-Zero* is one of a limited number of cases in which the Board has departed from the rule that, in a certification-testing unfair labor practice case, issues that had been presented to and decided by the Board in a prior, related representation case cannot be relitigated. Having reviewed the facts and arguments presented by the Respondent in its response to the Notice to Show Cause, we find no basis for departing from our longstanding rule or disturbing our Decision and Certification of Representative in the underlying representation case.

[6] The Respondent's cross-motion to dismiss the complaint is therefore denied.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time, and per-diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, excluding all other employees, managers, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Salem, New Jersey, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.[8] Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed its facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 17, 2011.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. November 29, 2011

Mark Gaston Pearce,	Chairman
Craig Becker,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

> Form, join, or assist a union
> Choose representatives to bargain with us on your behalf
> Act together with other employees for your benefit and protection
> Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to recognize and bargain with Health Professionals and Allied Employees (HPAE) as the exclusive collective-bargaining representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time, and per-diem Registered Nurses, including Staff Nurses, Case Managers, and Charge Nurses, excluding all other employees, managers, guards and supervisors as defined in the Act.

SALEM HOSPITAL CORPORATION A/K/A THE MEMORIAL HOSPITAL OF SALEM COUNTY

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[8] For the reasons stated in his dissenting opinion in *J. Picini Flooring,* 356 NLRB No. 9 (2010), Member Hayes would not require electronic distribution of the notice.